AMGENERAL INSURANCE BHD v. FAZLINA MIHAD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
FAIZAH JAMALUDIN JC
[ORIGINATING SUMMONS NO: WA-24NCVC-461-03-2017]
17 NOVEMBER 2017

INSURANCE: *Accident insurance – Insurable interest – Claim for damages – Registered owner sold car prior to accident – Whether insurance policy issued under registered owner's name void and unenforceable – Whether there had been transfer of interest of insured car – Whether there was insurable interest prior to accident*

INSURANCE: *Duty of disclosure – Material non-disclosure – Registered owner sold car prior to accident – No formal transfer of ownership – Insurance company not informed of transfer – Insurance policy continued to be issued under registered owner's name – Whether misrepresentation and non-disclosure of material facts – Whether there was transfer of interest where there was no formal transfer of ownership – Whether insurance policy for insured vehicle automatically lapsed where there was no novation of policy to new owner*

LIMITATION: *Commencement of action – When action commenced – Application under s. 96(3) of Road Transport Act 1987 – Application for declaration under specific provision of written law – Whether action time barred – Whether application founded on any subsections of s. 6(1) of the Limitation Act 1953 – Whether application made before judgment entered*

The first defendant ('D1') was the registered owner of the motorcar ('insured car'), insured under a policy issued by the plaintiff on the name of D1. An accident occurred between the insured car driven by the second defendant ('D2') and a motorcycle driven by the third defendant ('D3'). D3's solicitors issued a notice under s. 96(2) of the Road Transport Act 1987 ('RTA') and filed a claim for damages at the Kuantan Sessions Court ('the Kuantan suit'). The plaintiff, by way of an originating summons ('OS') sought a declaration under s. 96(3) of the RTA that the insurance policy for the insured car was void and unenforceable and that the plaintiff was not liable to any order or judgment under s. 96 for any claims filed or to be filed under the insurance policy in relation to the road accident. D1 filed a statutory declaration affirming that she had sold and delivered in the insured car for the purposes of 'trade-in' with another car long before the accident and had confirmed that the insured car was not in her control and she also stated that the did not know or had any relationship with D2. The plaintiff thus contended that the insurance policy issued under D1's name was void and unenforceable because the policy was not purchased by D1 for the insured car. The insurance policy was renewed in D1's name without the plaintiff's knowledge. Hence, the crux of the plaintiff's case was that there had been a 'transfer of interest' in the insured car and there was no 'insurable interest' prior to the accident. The questions for the court's determination herein

were: (i) whether the plaintiff made the application 'before the date of liability was incurred' in respect of the road accident; (ii) whether the plaintiff's application was time barred; and (iii) whether there had been a 'transfer of interest' and was there any 'insurable interest' in the insured car at the time of the road accident.

Held (allowing application):

(1) 'Before the date of liability was incurred' in s. 96(3) of the RTA means that before judgment in respect of any such liability covered by the insurance policy is given against the person insured by the policy. D3 had not obtained judgment in the Kuantan suit and therefore, the plaintiff was not barred under the RTA to seek a declaration under s. 96(3) of the RTA that the insurance policy was void and unenforceable. (paras 21 & 22)

(2) The plaintiff's application was not founded on any of the subsections of s. 6(1) of the Limitation Act 1953 ('LA 1953') and there was no defence filed in this originating summons. Neither was the action founded on contract or tort nor was it an action to enforce recognisance or an award. It was also not an action to recover any sum recoverable by virtue of written law. The plaintiff's application was for declaration under a specific provision of written law, *ie*, s. 96(3), which provides that the plaintiff may make the application for declaration before judgment is entered in respect of the road accident involving the insured car. As there was no judgment entered in the Kuantan suit, the LA 1953 was not applicable to the originating summons and the plaintiff's action was not time barred. (paras 25-27)

(3) In the authorities referred by the court, although there were no formal transfer of ownership of the vehicle to the new car owner in accordance with the procedures in s. 13 of the RTA, the courts in those cases held that there was a transfer of interest in the vehicle. However, the insurance policy for the insured vehicle in question automatically lapsed where there was no novation of the insurance policy to the new owner. The fact the car was sold and the insurance company was not informed was a misrepresentation and non-disclosure of material facts which entitled the insurance policy to be avoided. (paras 29-33)

(4) The plaintiff had served the relevant cause papers of the OS on D1, D2 and D3 and they had been made parties to this proceedings. Therefore, the plaintiff had satisfied the proviso in s. 96(3) and was entitled to rely on any declaratory order made by the court under s. 96(3). In the circumstances, the insurance policy was declared void and unenforceable. (paras 35 & 37)

Case(s) referred to:

Ahmad Nadzrin Abd Halim & Anor v. Allianz General Insurance Company (M) Bhd [2015] 9 CLJ 821 CA ***(foll)***

Asia Insurance Co Ltd v. Tat Hong Plant Leasing Pte Ltd [1992] 1 CLJ 330; [1992] 4 CLJ (Rep) 324 HC ***(refd)***

Kurnia Insurance (Malaysia) Bhd v. Personal Representative of Zenol Saad & Ors [2013] 1 LNS 239 HC ***(refd)***

Kurnia Insurans (Malaysia) Bhd v. Kein Hing Appliances Sdn Bhd [2012] MLHRU 1855 ***(refd)***

Pacific & Orient Insurance Co Bhd v. Goh Cheng Loong & Ors [2013] 1 LNS 1002 HC ***(refd)***

Pacific & Orient Insurance Co Bhd v. Rasip Hamsudi & Ors [2017] 4 CLJ 572 CA ***(dist)***

Peters v. General Accident & Life Assurance Corpn Ltd [1937] 4 All ER 628 ***(refd)***

Roslan Abdullah v. New Zealand Insurance Co Ltd [1981] 1 LNS 40 FC ***(refd)***

United Malayan Insurance Co Ltd v. Lee Yoon Heng [1964] 1 LNS 212 HC ***(refd)***

Legislation referred to:

Limitation Act 1953, s. 6(1)

Road Transport Act 1987, ss. 13, 96(1), (2), (3)

For the plaintiff - Melvin Selvam; M/s Sabarudin Othman & Ho

For the 3rd defendant - Vignesh Kumar; M/s Balendran Chong

[Editor's note: On 20 February 2018, the Court of Appeal in Civil Appeal No: W-02-(NCVC)(A)-1724-08-2017 allowed the 3rd defendant's appeal and set aside the decision of the High Court herein.]

Reported by S Barathi

JUDGMENT

Faizah Jamaludin JC:

Application

[1] This is an application by the plaintiff by way of an originating summons (encl. 1) for this court to declare that:

(a) the insurance policy no. V5252720 ("insurance policy") for the motorcar no. JFS 3133 for the period between 8 November 2013 until 7 November 2014 is void and unenforceable; and

(b) the plaintiff is not liable to any order or judgment under s. 96 of the Road Transport Act 1987 ("RTA") for any claims filed or to be filed under the insurance policy in relation to the said road accident.

Facts

[2] The first defendant ("D1") is the registered owner of the motorcar no. JFS 3133 ('insured car'). The insurance policy was issued by plaintiff on the name of D1 to insure the insured car for the period from 8 November 2013 until 7 November 2014.

[3] An accident occurred on 6 September 2014 between the insured car driven by the second defendant ("D2") and a motorcycle no. CBD 3666 driven by the third defendant ("D3") at Jalan Pekan-Nenasi/Tanjung Agas, Pekan, Pahang ("the road accident"). D2 lodged a police report on 6 September 2014 and D3 lodged a police report on 9 October 2014.

[4] D3's solicitors, Messrs Balendran Chong, issued a notice under s. 96(2) of the RTA to the plaintiff on 9 October 2014.

[5] On 12 April 2016, D3 filed his claim for damages in respect of the road accident at the Kuantan Sessions Court *vide* Suit No. A53KJ-99-04-2016 ("Kuantan suit").

[6] The plaintiff filed this originating summons for declaration under s. 96(3) of the RTA.

[7] The plaintiff's affidavit in support of its application was affirmed by Abel a/l Anthony who is the plaintiff's claims manager. In the affidavit in support, the plaintiff averred that it had appointed an adjuster to investigate all aspects of the road accident. The adjuster's investigation discovered, *inter alia*, that:

(a) D1 had in November 2007 sold and delivered the insured car to a Malay man named Zul who was a salesman at Tetuan Dijadi Auto, Jalan Zabedah, Batu Pahat for purposes of "trade-in" with a Honda Civic motorcar;

(b) D1 failed to notify the plaintiff that the insured car had been sold by way of a "trade-in" to Zul;

(c) the insured car was subsequently purchased in 2010 by Nakiuddin bin Ahmad, the second defendant ("D2"). D2 admitted that he purchased the car from a man in 2010 for RM10,000 cash;

(d) the insured car was not under the control of D1 at the time of the road accident with motorcycle no. CDB 3666 driven by D3; and

(e) D1 did not have any ties and/or relationship with D2 and did not know D2. She did not give D2 her permission to drive the insured car.

[8] D1 filed a statutory declaration dated 1 August 2016 affirming that she had sold and delivered the insured car to Zul for purposes of "trade-in" with a Honda Civic motorcar. She confirmed that the insured car was not in her control since November 2007 and she does not know or have any relationship with D2.

Plaintiff's Case

[9] The plaintiff's case is that at the time of the road accident between the insured car driven by D2 with motorcycle no. CBD 3666 driven by D3, there had been a transfer of interest and no insurable interest since the insured car was sold and no longer in the custody and control of D1.

[10] The insurance policy was renewed in D1's name since 2007 without the plaintiff's knowledge. If the plaintiff knew that the insured motorcar was sold in 2007, it would not have continued issuing the insurance policy in D1's name.

[11] The insurance policy issued on D1's name is void and unenforceable because the policy was not purchased by D1 for the insured car as she had sold the motorcar in 2007.

[12] Therefore, the claim filed by D3 in the Kuantan suit and any other actions filed or to be filed in relation to the road traffic accident is not insured under the insurance policy because there has been a breach of the fundamental terms and conditions, which caused the insurance to be void and unenforceable against the plaintiff.

D3's Case

[13] D3 submits that the plaintiff's application in encl. 1 should be dismissed for the following reasons:

(a) The plaintiff failed to establish transfer;

(b) There is no contract of sale between the plaintiff and the purported buyer;

(c) D1 had no capacity to transfer the car;

(d) The plaintiff's action is barred by limitation/doctrine of laches.

[14] D3 argues that D1's statutory declaration dated 1 August 2016 exhibited by the plaintiff, is insufficient to show the transfer of ownership of the insured car from D1 to another person. There is no contract of sale between D1 and Zul, the purported buyer, and the transfer did not comply with the procedures in s. 13 of the Road Transport Act 1987 ("RTA"). D3 submits that the plaintiff has failed to prove any form of agreement or acceptance from Zul for the purchase of the motorcar.

[15] D3 further argues that D1 had no capacity to transfer the motorcar as the car is still subject to a hire-purchase agreement with CIMB Bank. D3 submits that under the Hire-Purchase Act 1967 ("HPA") any assignment of rights, title or interest of a hirer under a hire-purchase agreement cannot be done without the consent of the owner.

[16] Finally, D3's counsel submits that the plaintiff's action is statute-barred under the Limitation Act 1953 and under the equitable doctrine of laches since the plaintiff filed this originating summons on 22 March 2017 more than six years after D1 breached her contract of insurance with the plaintiff. D1 sold the vehicle to Zul in November 2007.

[17] D1 and D2 did not file an affidavit in reply to the plaintiff's affidavit in support of this application.

A **Law And Analysis**

[18] Pursuant to s. 96(1) of the RTA, an insurer is under obligation to satisfy judgments against persons insured in respect of third parties. One of the exceptions to this obligation is if the insurer obtained a declaration under s. 96(3) of the RTA that the insurance was void or unenforceable before the
B date of liability was incurred. Section 96(3) of the RTA states:

> (3) No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable:
>
> C Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not become entitled to the benefit of this subsection as respects any judgement obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice to the person who is the plaintiff in the
> D said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.

[19] The plaintiff is seeking for a declaration under s. 96(3) of the RTA that the insurance policy for the insured car is void and unenforceable. The crux
E of the plaintiff's case is that there had been a "transfer of interest" in the insured car and that there was no "insurable interest" prior to the accident.

[20] In determining whether to exercise its discretion to allow the plaintiff's application under s. 96(3) of the RTA to declare the insurance policy to be void and enforceable, the questions before this court are
F whether:

(a) the plaintiff made the application "before the date of liability was incurred" in respect of the road accident;

(b) the plaintiff's application is time-barred;

G (c) there had been a "transfer of interest" and was there any "insurable interest" in the insured car at the time of the road accident?

Did The Plaintiff Makes The Application "Before The Date Of Liability Was Incurred" In Respect Of The Road Accident?

H **[21]** The Court of Appeal in *Ahmad Nadzrin Abd Halim & Anor v. Allianz General Insurance Company (M) Bhd* [2015] 9 CLJ 821; [2015] 6 MLRA 523 agreed and cited with approval the decisions of the High Court in *Kurnia Insurans (Malaysia) Bhd v. Kein Hing Appliances Sdn Bhd* [2012] MLHRU 1855 and *Pacific & Orient Insurance Co Berhad v. Goh Cheng Loong & Ors* [2013]
I 1 LNS 1002; [2013] MLRHU 998; [2014] 1 AMCR 322 that the phrase "before the date of liability was incurred" in s. 96(3) of the RTA means

before judgment in respect of any such liability covered by the insurance policy is given against the person insured by the policy. Hamid Sultan Abu Backer JCA in *Ahmad Nadzrin Abd Halim* said:

> [50] Under s. 96(1), if judgment has been made against the motor vehicle owner, the law requires the insurer to pay to the third party who holds the judgment, notwithstanding the insurer could have avoided or cancelled the policy.

[22] Therefore, the plaintiff is not barred under the RTA to seek for a declaration under s. 96(3) of the RTA that the insurance policy is void and unenforceable since D3 has not yet obtained judgment in the Kuantan suit.

Is The Plaintiff's Application Time-barred?

[23] The defendants' counsel submits that the plaintiff is time-barred under the Limitation Act 1953 ("LA 1953") from making the application for declaration because since the plaintiff filed this originating summons on 22 March 2017, which is more than six years after D1 sold the vehicle to Zul in November 2007.

[24] The LA 1953 expressly provides that:

> Limitation not to operate as a bar unless specially pleaded
>
> 4. Nothing in this Act shall operate as a bar to an action unless this Act has been expressly pleaded as a defence thereto in any case where under any written law relating to civil procedure for the time being in force such a defence is required to be so pleaded.
>
> Limitation of actions of contract and tort and certain other actions
>
> 6. (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:
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> (a) actions founded on a contract or on tort;
>
> (b) actions to enforce a recognisance;
>
> (c) actions to enforce an award;
>
> (d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture.

[25] There is no defence filed in this originating summons. Furthermore, the plaintiff's application is not founded on any of the subsection of s. 6(1) of the LA 1953. It is neither an action founded on contract or tort nor is it an action to enforce recognisance or an award. It is also not an action to recover any sum recoverable by virtue of written law.

[26] The plaintiff's application is for declaration under a specific provision of written law, namely s. 96(3) of the RTA, which provision expressly provides (as interpreted by the courts in the decisions discussed above) that

A the plaintiff may make the application for declaration before judgment is entered in respect of the road accident involving the insured car. It is not disputed that judgment has yet to be entered in the Kuantan suit.

[27] Accordingly, this court finds that the LA 1953 does not apply to this originating summons and the plaintiff's application is not time-barred.

B

Had There Been A "Transfer Of Interest"And Was There Any "Insurable Interest" In The Insured Car At The Time Of The Road Accident?

[28] D3's counsel submits that there has been no transfer of interest in the insured car from D1 to D2 since the procedures under s. 13 of the RTA were C not followed in effecting the transfer and D1 had no capacity to transfer the motorcar as the car is still subject to a hire-purchase agreement with CIMB Bank.

[29] Like the facts of this present case, in *Ahmad Nadzrin Abd Halim & Anor* the sale of the insured car took place before the date of the accident, but the D change of ownership was never registered in the name of the purchaser and remained in the name of the insured. The new owner also continued to renew the insurance policy of the car in the name of the old owner. The Court of Appeal in *Ahmad Nadzrin Abd Halim & Anor* affirmed the decision of the High Court which held that the failure of the defendant to disclose the sale of the E motorcar was a non-disclosure of a material fact which entitled it to avoid the policy issued to the registered owner of the motorcar. The High Court in *Ahmad Nadzrin Abd Halim & Anor* had cited with approval the Singapore High Court decision in *Asia Insurance Co Ltd v. Tat Hong Plant Leasing Pte Ltd* [1992] 1 CLJ 330; [1992] 4 CLJ (Rep) 324; [1992] 1 BLJ 122; [1992] F 1 MTC1 22 which held that an insurance contract is a contract *uberrima fides*. As such, it can be avoided for misrepresentation as well as for non-disclosure of material facts. The obligation to disclose material facts arises regardless of whether the assured has been asked to complete a proposal form or had been asked any other questions by the insurer. The court also cited *United* G *Malayan Insurance Co Ltd v. Lee Yoon Heng* [1964] 1 LNS 212; [1964] MLJ 453 where it was held that the plaintiffs were entitled to avoid the policy because it was obtained by non-disclosure of material fact or by a representation of material fact which was false.

[30] In the English case of *Peters v. General Accident & Life Assurance Corpn* H *Ltd* [1937] 4 All ER 628, the vendor of a motorcar insured by the defendant insurance company handed over the insurance policy with the car to the purchaser. The policy contained the usual clause extending the cover to any person driving with the consent or permission of the insured. The plaintiff, who had been injured by the car after the sale had been completed, obtained I a judgment against the purchaser, and in this subsequent action sought to

recover the damages, he had been awarded from the insurance company under the provisions of the Road Traffic Act 1934. Goddard J (as he then was) dismissed the plaintiff's claim and held that:

(i) when the vendor sold the car, the insurance policy automatically lapsed.

(ii) at the time of the accident, the purchaser could not be said to be driving the car by the order or with the permission of the vendor, as the car was then the purchaser's own property.

(iii) the insured is not entitled to assign his policy to a third party. An insurance policy is a contract of personal indemnity, and the insurer cannot be compelled to accept responsibility in respect of a third party who may be quite unknown to them.

[31] Goddard J's decision in *Peters v. General Accident & Life Assurance Corpn Ltd* was affirmed by the British Court of Appeal in [1938] 2 All ER 267. It was referred to and followed by the Malaysian Federal Court in *Roslan Abdullah v. New Zealand Insurance Co Ltd* [1981] 1 LNS 40; [1981] 2 MLJ 324; [1981] 1 MLRA 445. In *Roslan bin Abdullah* the Federal Court held that once ownership of the truck changed, the insurance policy lapsed unless there was novation of the policy. As the policy was not novated, there was no insurance policy at the time of the accident. Accordingly, the Federal Court held that the driver of the truck was not covered by the insurance policy.

[32] The decision in *Roslan bin Abdullah* was followed by the High Court in *Kurnia Insurance (Malaysia) Berhad v. Personal Representative of Zenol Saad & Ors* [2013] 1 LNS 239; [2013] MLRHU 1, Yeoh Wee Siam J (as she then was) held that:

> From the above authorities, it is clear upon the sale of the car by the Deceased to R2, and in the absence of any evidence of novation of the Policy, the insurable interest of the Deceased ceased. The Policy automatically lapsed. The Deceased could not assign in his Policy to R2 or any third party. Therefore, the insurers or the Applicant cannot be held responsible respect of a third party such as R3 and R4.

[33] In all the cases cited above, although there was no formal transfer of ownership of the vehicle to the new owner in accordance with the procedures set-out in s. 13 of the RTA, the courts held that there was a transfer of interest in the vehicle. However, the insurance policy for the insured vehicle in question automatically lapsed where there was no novation of the insurance policy to the new owner. The courts also held that the fact the car was sold and the insurance company was not informed was a misrepresentation and non-disclosure of material facts, which entitled the insurance policy to be avoided.

Compliance With The Proviso In s. 96(3) Of The RTA

[34] D3's counsel at the hearing orally raised the case of *Pacific & Orient Insurance Co Bhd v. Rasip Hamsudi & Ors* [2017] 4 CLJ 572; [2016] MLJU 1317, where the Court of Appeal affirmed the decision of the High Court that the insurance company in that case was not entitled to benefit from the declaratory order under s. 96(3) of the RTA against the judgment obtained in the Sessions Court. In my view, the facts in *Rasip Hamsudi* can clearly be distinguished from the facts in this present case. In *Rasip Hamsudi*, the appellant insurance company did not serve the cause papers of the originating summons seeking the declaratory order on the first, second and third respondents. The Court of Appeal found that the declaratory order obtained by the appellant was in violation of the proviso in s. 96(3) of the RTA since the respondents were not served the requisite notice as required by the proviso. Varghese George JCA in delivering the judgment of the Court of Appeal held:

> [22] On the facts of this case, there was no issue that the appellant had not served the requisite notice on the first, second and third respondents as stipulated in the proviso. The declaratory order obtained by the appellant under saman pemula-1 was clearly in violation of the provisions of s. 96(3) of the RTA. The appellant's omission therefore amounted to not just an infringement of that statutory provisions but had the effect of denying the first, second and third respondents of their right to be made a party and be heard on the matter in saman pemula-1. *There was no two ways about this. It was our view that if the relevant cause papers had been served by the appellant, it would have satisfied the two limbs of the requirement, namely, of notice of the saman pemula-1 proceedings and also of the grounds that was being relied upon by the appellant in such an application.*
>
> (emphasis added)

[35] In this present case, it is not disputed that the plaintiff had served the relevant cause papers of this originating summons on D1, D2 and D3 and they have been made parties to these proceedings. Therefore, based on the *dicta* of Varghese George JCA in *Rasip Hamsudi* quoted above, the plaintiff has satisfied the proviso in s. 96(3) and is entitled to rely on any declaratory order made by this court under s. 96(3) of the RTA.

Decision

[36] For the reasons above, the plaintiff's application is allowed.

[37] I declare that the insurance policy no. V5252720 insuring the motorcar no. JFS 3133 for the period between 8 November 2013 until 7 November 2014 is void and unenforceable.